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Office of Administrative Law Judges
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Issue Date: 25 July 2003

CASE NO.: 2001-LHC-02470

OWCP NO.: 01-126021

In the Matter of

BRIAN M. REZENDES, Sr.
Claimant

v.

GENERAL DYNAMICS CORPORATION/
ELECTRIC BOAT DIVISION
Self-Insured Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Carolyn P. Kelly, Esquire (O'Brien, Shafner, Stuart, Kelly & Morris), Groton, Connecticut, for the Claimant

Edward W. Murphy, Esquire (Morrison, Mahoney & Miller), Boston, Massachusetts, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER GRANTING MODIFICATION AND AWARDING BENEFITS AND SPECIAL FUND RELIEF

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Brian M. Rezendes, Sr. (the Claimant), against the General Dynamics Corporation, Electric Boat Division

(the Employer) under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). After suffering a series of work-related injuries to his back and neck during the course of his 22 years of employment as a painter/cleaner in the Employer's shipyard, the Claimant stopped working in December 1992 and began receiving voluntary temporary total disability compensation payments from the Employer. The Claimant sought an award of permanent total disability compensation, and his claim was originally heard by Administrative Law Judge David W. Di Nardi in December 1995. In his decision and order issued on May 6, 1996, Judge Di Nardi found that the Claimant was totally disabled, but he concluded that his disability was temporary in nature based on medical evidence that he needed further surgery and treatment related to a temporomandibular joint (TMJ) condition for which the Employer has accepted liability. *Rezendes v. General Dynamics Corp.*, Case Nos. 1995-LHC-01276 & 1995-LHC-02765, Decision and Order at 6-18.

The Claimant now seeks to modify the award of temporary total disability compensation pursuant to section 22 of the Act to an award of permanent total disability compensation, contending that Judge Di Nardi's finding of a temporary disability was based on a mistake of fact. Alternatively, he contends that modification is warranted based on changed circumstances, and he additionally seeks an order that the Employer pay for dental care which, he asserts, is causally related to his workplace injuries. The Employer does not oppose the requested modification of the award to permanent total disability, though it suggests a date of permanency later than that urged by the Claimant. The Employer does, however, contests its liability for the Claimant's dental care and prescription pain medications, and it seeks Special Fund relief from its compensation liability pursuant to section 8(f) of the Act.

The District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP) conducted an informal conference on the modification request and referred the matter to the Office of Administrative Law Judges for a formal hearing which was conducted before me in New London, Connecticut on March 20, 2002. The Claimant appeared at the hearing represented by counsel, and an appearance was made on behalf of the Employer. No appearance was made on behalf of the Director, OWCP.[1] The Claimant was the only witness to testify at the hearing, and documentary evidence was admitted as Claimant Exhibits ("CX") 1-46 and Employer Exhibits ("RX") 1-10. Hearing Transcript ("TR") at 7-9. At the close of the hearing, the record was held open at parties' request for offers of additional evidence and written closing argument. Within the time allowed, the parties offered the following evidence which has been admitted in the absence of any objection:

Transcript of the prior hearing (December 1, 1995)	CX 47;
Deposition of Casper Burke, D.M.D. (December 13, 1995)	CX 48;

[1] The Regional Office of the Solicitor of Labor advised by letter dated February 15, 2002 that it had received notice of the Employer's application for Special Fund relief and that it would not participate in the hearing. Administrative Law Judge Exhibit ("ALJX") 9.

Deposition of Casper Burke, D.M.D. (April 16 2002) CX 49; and

Deposition of Leonard Skope, D.D.S. (April 12, 2002) RX 11.

After completion of the evidentiary development, the Claimant and the Employer timely filed helpful closing argument, and the record is now closed.

Upon review of the evidence of record and the parties' arguments, I conclude that modification of the prior award to permanent total disability compensation is warranted. I also conclude that the Claimant is entitled to the disputed medical care, interest on unpaid compensation and medical expenses, and attorney's fees. I further conclude that the Employer entitled to a credit in the amount of its past voluntary compensation payments and Special Fund relief. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Stipulations and Issues Presented

Based on Judge Di Nardi's decision and order, which was not appealed, and the record developed in this case, the parties have stipulated that: (1) the Claimant suffered injuries to his back, neck and temporomandibular joint which arose out of and in the course of his employment at the Employer; (2) the parties continue to be subject to the Act; (3) an employer/employee relationship existed between the Claimant and the Employer at the time of the injuries; (4) notices and claims were timely filed; (5) the informal conference was held on May 2, 2001; (6) the Claimant is totally disabled; (7) medical benefits, with the exception of the restorative dental care currently at issue, have been paid; (8) temporary total disability compensation has been paid from February 11, 1993 through the present time; and (9) the applicable average weekly wage, as determined by Judge Di Nardi, is $578.65. TR 10-12. The parties's stipulations are fully supported by the evidence of record and, to the extent that they are based on the findings of Judge Di Nardi, represent the law of the case. *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103, 106 (1999). Accordingly, I adopt the parties' stipulations my findings.

The parties further agree that the unresolved issues are: (1) whether the Claimant is permanently and totally disabled and, if so, when he reached maximum medical improvement; (2) whether the Claimant's restorative dental treatment arises out of and in the course of his employment and, if so, whether the Claimant is entitled to reimbursement for treatment and medication prescribed by Dr. Burke for his dental condition; and (3) whether the Employer is entitled to Special Fund relief.

B. Modification - Is the Claimant Permanently and Totally Disabled?

The Claimant requests modification of Judge Di Nardi's May 3, 1996 finding that the Claimant was temporarily, not permanently, under a total disability. In his decision and order,

Judge Di Nardi found that the Claimant's TMJ injury was causally related to his employment, and he noted that Dr. Burke, his treating oral and maxillofacial surgeon, had recommended additional TMJ surgery. Decision and Order at 8, 14. The Claimant argued before Judge Di Nardi that he should be found permanently disabled because the additional TMJ surgery would have no effect on his overall condition and because the medical opinions in the record indicated that he had reached a point of maximum medical improvement from his back and neck injuries. Decision and Order at 16. Judge Di Nardi rejected this argument and concluded that the Claimant was not at that point in time permanently disabled due to his need for additional TMJ surgery:

> As Dr. Burke categorically states that Claimant needs additional surgery for his TMJ condition, Claimant has not reached maximum medical improvement. He is forty-six (46) years of age and successful TMJ surgery, "significant future successful intervention," according to Dr. Willetts, will enable him to reach a medically-stable condition and the parties will then be in a better position to determine Claimant's transferable skills and his residual work capacity.
>
> I note that Dr. Willetts reports "(t)hree positive nonorganic findings of physical examination inconsistency" (RX 8) and to declare Claimant totally disabled as of December 9, 1992 would simply deprive Claimant of any motivation to return to work and, again, the Special Fund would become the employer of last resort.
>
> Accordingly, I find and conclude that Claimant is still temporarily disabled and it is obvious that Claimant's recovery has been significantly delayed by the Employer's failure to approve and authorize the additional surgery for Claimant's TMJ condition.

Decision and Order at 18 (quotation marks in original).[2] Judge Di Nardi also made an alternate finding in the event that he were reversed on permanency, that December 9, 1992 was a reasonable date for maximum medical improvement. Decision and Order at 21.

Section 22 of the Act permits modification of a prior denial of a claim or award of benefits grounds that there has been a change in conditions or a mistake in a determination of fact. 33 U.S.C. § 922. In support of his request for modification, the Claimant argues that Judge Di Nardi's finding that he had not reached maximum medical improvement was based on a mistake of fact because the additional TMJ surgery recommended by Dr. Burke did nothing to improve his employability. Memorandum of Behalf of the Claimant at 14-16. Alternatively, the Claimant argues that modification should be granted because of a change in circumstances since his condition has deteriorated subsequent to the hearing before Judge Di Nardi. *Id.* at 16-17. The Employer responds that Judge Di Nardi's finding on MMI constitutes the law of the case and that

[2] The Employer agreed to pay for the TMJ surgery at the time of the hearing before Judge Di Nardi. Decision and Order at 2-3.

it would therefore be unreasonable to establish a date of maximum medical improvement prior to 1996. Employer's Post-hearing Memorandum at 3.

1. Mistake of Fact

The Act's modification provision confers broad discretion to correct mistakes of fact, whether they are demonstrated by wholly new evidence, cumulative evidence, or merely by further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-56 (1971). An administrative law judge's authority to reopen proceedings extends to all mistaken factual determinations, including mistaken determinations of mixed questions of law and fact; *Ring v. I.T.O. Corporation of Virginia*; 31 BRBS 212, 214-215 (1998); and an allegation that an administrative law judge made a mistake of fact in determining the date of a claimant's maximum medical improvement is an appropriate issue for reconsideration in a modification proceeding. *See Allen v. Strachan Shipping Co.*, 11 BRBS 864, 866-867 (1980). However, while section 22 has been broadly interpreted as a vehicle for ensuring that the interests of justice are served, it does not provide parties with an unlimited opportunity to reopen a prior award or denial whenever they find themselves dissatisfied with the outcome of prior litigation. Rather, the need to render justice must be balanced against the need for finality in decision-making. *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25 (1st Cir. 1982). As the Court of Appeals for the District of Colombia Circuit cautioned in *McCord v. Cephas*, 532 F. 2d 1377, 1380-81, "an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt . . . [t]he congressional purpose in passing the law would be thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation." *See also* 3 Larson Workmen's Compensation Law § 81.52 ("It is clear that an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt"). Thus, the Board has held that reopening a case based on an allegation of a mistake of fact is discretionary and that an administrative law judge should consider whether reopening will render justice under the Act, a consideration which requires a balancing of competing equities – the need to render justice against the need for finality in decision-making. *Kinlaw v. Stevens Shipping and Terminal Company*, 33 BRBS 68, 73 (1999).

In addition to the opinion from Dr. Burke, the record before Judge DiNardi contained reports from Alan H. Goodman, M.D. and Philo T. Willetts, Jr., M.D. who examined the Claimant for the Employer. Dr. Willetts, who examined the Claimant in April 1993, stated that the Claimant "probably" had reached maximum medical improvement "unless there be some future successful intervention." Decision and Order at 10, quoting from Dr. Willetts's report which was in evidence as RX 8. When asked for the date of maximum medical improvement, Dr. Willetts appeared to defer to the Claimant, writing that the Claimant "states that he reached maximum medical improvement on December 9, 1992." *Id.* Dr. Goodman observed in June 1994 that the Claimant's condition had not significantly changed since the time of his last injury in

November 1992 and concluded that he was at a point of maximum medical improvement "in reference to his neck and low back condition." RX 4 at 3.[3] The parties have now offered two additional opinions addressing permanency. In a report dated May 15, 1997, neurosurgeon Melville P. Roberts, M.D. concluded after examining the Claimant and taking his history that he had reached maximum medical improvement. CX 12 at 2. However, he did not address the point in time when the Claimant's condition reached that plateau. Mario J. Sculco, M.D., the neurosurgeon who has treated the Claimant extensively for his back and neck injuries, stated in a letter dated April 26, 2001 that the Claimant "has been considered permanently and totally disabled since November 10, 1992." CX 38.

From my review of the entire record, including the body of new medical evidence which is discussed below, I am not persuaded that there was any mistake of fact in Judge Di Nardi's May 3, 1996 determination that the Claimant had not reached maximum medical improvement. Granted, there was evidence introduced at the earlier hearing which showed that the Claimant had likely reached a medical end point with respect to his back and neck injuries. That the Claimant's back and neck were as good as they were going to get in 1992 is confirmed by the newly submitted evidence. However, there is no question that the Claimant's TMJ condition had not stabilized at the time of the hearing before Judge Di Nardi and that this condition required further surgery which, it was hoped, would improve the Claimant's level of functioning. Under these circumstances, even when viewed from today's perspective with all of the new evidence, I find that Judge Di Nardi's determination that the Claimant had not reached maximum medical improvement as of May 3, 1996 is reasonable and supported by substantial evidence. Accordingly, I conclude that reopening that determination on the basis of a mistake of fact is not warranted and is not necessary to render justice under the Act, especially since reopening, as discussed below, can be accomplished in this case based upon a change in conditions.

2. Change of Condition

Subsequent to the hearing before Judge Di Nardi, Roger J. Harris, D.D.S., an oral and maxillofacial surgeon, evaluated the Claimant's TMJ condition and reported that he was suffering from "severe bilateral pain, limitation of motion, bilateral coarse crepitus, chronic headaches, chronic controlled substance habituation/dependence for adequate pain control and chronic pain with chewing, limiting his diet to liquids and "blenderized" or soft, minimally chewable foods only. CX 3 at 1. Based on his evaluation, which included psychiatric and narcotic usage evaluations, Dr. Harris concurred with Dr. Burke's recommendation for further surgery, and he performed bilateral TMJ condylectomy, menisectomy and arthroplasty with prosthetic joint replacement on June 4, 1996. CX 4-5.

In November and December 1996, the Claimant received a series of epidural steroid injections in an effort to relieve lower back symptoms. CX 8-9. On March 3, 1997, Dr. Sculco

[3] Dr. Goodman's reports were admitted into the record before Judge Di Nardi as RX 6 and RX 7. CX 47, December 1, 1995 Hearing Transcript at 18.

reported that the injections had provided minimal relief and that the Claimant continued to have weakness, numbness and pain in his left lower extremity which he attributed to lumbar stenosis with significant compressive bulging. He recommended that the Claimant undergo a decompressive laminectomy. CX 11. Two months later in May, Dr. Roberts disagreed, noting that the Claimant had been out of work since 1992 and stating that it was highly unlikely that he would ever be able to return to his usual work as a painter at the Employer. CX 12 at 2. In June, Dr. Sculco reported that the Claimant was adamant about having the decompressive laminectomy, and he stated that he would attempt to have the Claimant's private insurance cover the cost of the surgery. CX 13.

On July 24, 1997, the Claimant was seen by Dr. Harris for swelling on the left side of his face in the area of the TMJ replacement. Dr. Harris diagnosed myositis of the masseter (cheek) muscle with headaches directly related to his TMJ dysfunction. He did not feel that there was any problem with the TMJ prosthesis, and he recommended referral a Dr. Arthur Dean who specialized in nonsurgical treatment modalities. CX 14-1.[4]

On September 16, 1997, Dr. Sculco reevaluated the Claimant and found that he was having increased low back numbness and pain. He had no question that these symptoms were causally connected to the Claimant's work-related back injuries, and he reiterated his recommendation for surgical intervention:

> The other issue to be considered is whether or not such surgery would have meaning to a patient describing essentially daily pain increased by activity, only partially relieved by rest (this the keynote of a stenotic spine). There is little question that one could anticipate an improvement in this area. Whether or not this improvement would be more likely than not to permit him the possibility of returning to some kind of work, if not vigorous activity that this step in itself in a person who has physical multiple areas of problems will tip the scales to the point where he can become totally functional. There would be the cervical symptoms and again the lower lumbar symptoms to contend with which he would not address in the treatment of the L2-3 disc pathology. Definitely food for thought, definitely room for discussion and definitely a situation where one could anticipate the improvements.

CX 15 at 1-2. On October 28, 1997, Dr. Sculco performed an L2-L3 laminectomy, facetectomy, excision of a herniated nucleus pulposis and neurolysis. CX 16. On December 1, 1997, Dr. Sculco reported that the Claimant's left side low back symtoms had improved, but he had developed right hip pain. CX 17. Dr. Sculco ordered x-rays of the Claimant's hips which showed mild bilateral osteoarthritis. CX 18. In February 1998, after reviewing the x-rays, Dr. Sculco reported that the Claimant had worsening pain in both hips in addition to sacroiliac and low back pain. His impression was gradual post-surgical improvement of the Claimant's L2-L3 nerve root

[4] There is no evidence that the Claimant ever saw Dr. Dean.

irritation syndrome, and he recommended referral to an orthopedic surgeon for evaluation of the Claimant's hips. He also stated, "Brian at this time is considered temporarily totally disabled." CX 19. Dr. Sculco further stated that it was his opinion that the Claimant's hip problems are causally related to his work injury at the Employer in 1992. CX 21. Dr. Sculco referred the Claimant to J. Andrew Hallberg, M.D. for an orthopedic evaluation of his hips. CX 20. Dr. Hallberg saw the Claimant on April 2, 1998 and provided the following assessment and recommendations:

> I think this patient is unquestionably a chronic pain patient. His pain is due to his multiple back operations which in my opinion, based on the limited history I have, certainly seem grossly inappropriate. I think his 10 year history of narcotic management is also inappropriate and the combination results in a very difficult situation. There just is no easy way to deal with him.
>
> I told him the most important thing is to not let anyone operate on I again and I think the only thing that would have a chance of him helping him would be with a multiple disciplinary chronic pain treatment program. Those are expensive. His insurance may not cover it and they are not near by either so he would have to travel to get involved in one. He was told there was a pain management program at L & M [Lawrence and Memorial Hospital]. I am very familiar with that since I work there and it's not a pain management program – it's an anesthesiologist Dr. Hargus, who can do specific nerve blocks. He need a lot more then that because he needs to be detoxified from his chronic narcotics and at the least there has to be a psychiatrist, a physiatrist, and various other specialists involved.
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> I told him to return to Dr. Sculco and also to Dr. Roger Harris, who have talked about pain management with him in the past. I think that is the logical way to go at this point and I stated emphatically that this is not any kind of an orthopedic problem at this point.

CX 23 at 1-2. Between October 1998 and April 1999, the Claimant received additional epidural block injections for his low back symptoms. CX 25-27. A MRI examination in July 1999 showed recurrent L2-L3 disc protrusion. CX 29. In October, Dr. Sculco reported that the Claimant stated that his low back pain and symptoms were worsening, and a CT scan in November revealed a moderate right-sided herniated disc at L2-L3. CX 30-31. On December 2, 1999, Dr. Sculco noted that the Claimant continued to report worsening low back pain, and he recommended further surgery. CX 32. On December 22, 1999, the Claimant was seen by neurosurgeon C.G. Salame, M.D. for a second opinion on surgery. CX 33. Dr. Salame's impression was a herniated nucleus pulposis at L2-L3 with right L3 radiculopathy, and he stated that "[h]aving failed conservative therapy I believe the patient should improve from an L2-L3 diskectomy right side and agree with the planned procedure for such." *Id*. at 2.

On January 12, 2000, notwithstanding Dr. Halberg's admonition against further surgery, the Claimant underwent a fasciectomy, right neurolysis, disc excision and foraminal decompression at L2-L3 performed by Dr. Sculco. CX 34. The record shows that following this surgery, the Claimant received another series of epidural lumbar injections as well as injections to relieve pain in the trochanteric bursas. CX 36-37, 39. In April 2001, Dr. Sculco declared that the Claimant had been totally and permanently disabled since November 10, 1992.

The most recent medical evidence of the Claimant's overall condition is the report of an independent medical examination by neurosurgeon Jonathan Ballon, M.D. who examined the Claimant and reviewed his lengthy medical history on February 20, 2002. CX 40. Dr. Ballon stated that "[t]his is one of the most difficult cases I have been ever asked to review." *Id.* at 2. He further stated that "[g]iven the patient's tenth grade education, his limited work experience . . ., his rather extensive surgery and significant disability, narcotic dependence, and his ten years out of work, I think that Mr. Rezendes is, for all practical purposes, unemployable." *Id.* at 2-3.

A final award may be modified under section 22 where there has been a change in a claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 301 (1995); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147, 149 (2000). In my view, the evidence clearly establishes that the Claimant's physical condition, and his economic condition as well, have changed since the award of temporary total disability benefits was entered in May 1996. Sadly, this change has not been for the better. Where there was a realistic medical possibility in 1996 that the Claimant's condition might be improved through further surgery, it is painfully clear at this point in time that he has not improved and, in fact, has worsened to the point where no physician is currently expressing any hope that he will ever return to gainful employment. Given the multitude of somewhat conflicting opinions in the record, fixing a date of maximum medical improvement is difficult. After careful consideration of the various opinions and the parties's arguments in light of Judge Di Nardi's determination that the Claimant had not arrived at a medical end point in 1996 due to the pendency of the TMJ replacement surgery, and noting particularly that the additional back surgeries in 1997 and 2000 did not appreciably improve the Claimant's functioning, I find it most reasonable to establish maximum medical improvement on July 24, 1997 when Dr. Harris discharged the Claimant from treatment. CX 14. Therefore, I find that the Claimant has been permanently and totally disabled since July 24, 1997. I base my finding of a continuing total disability on the overwhelming evidence that the Claimant cannot return to his usual employment as a painter/cleaner and the absence of any demonstration that suitable alternative employment is available. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976). Indeed, the only vocational opinion in the record concludes, in agreement with Dr. Ballon, that the Claimant is unemployable. CX 45.

C. The Employer's Liability for Restorative Dental Work and Pain Medication

As discussed in greater detail below, the Claimant has suffered serious deterioration of his teeth to the point that many are beyond restoration and need replacement with dentures. In addition, the Claimant continues to use a significant amount of pain medication. While the

Employer concedes that the Claimant's TMJ syndrome arose out of and in the course of his employment and that it is liable for reasonable and necessary medical care related to this condition, it disputes whether the Claimant's dental decay and his consequent need for restoration is work-related. It also contends that the pain medication and local anesthesia prescribed for the Claimant is neither reasonable nor necessary for any work-related condition.

1. Dental Restoration

The Claimant testified that he had difficulty opening his mouth and was limited to a liquid diet from the time of his injury at work in 1992. TR 27-29. The problems with opening his mouth continued after the TMJ surgery in 1996, TR 25-26, and the Claimant testified that his difficulty opening his mouth prevented him from brushing his teeth and caused his teeth to fall apart. TR 29. He stated that prior to the TMJ replacement surgery in 1996, he was able to brush his front teeth but was unable to reach his back teeth. TR 43-46. He also used a rinse recommended by Dr. Burke. TR 46-47.

On March 3, 1998, Dr. Burke wrote to the Employer's workers' compensation administrators and stated that the Claimant's restorative dental needs are related to his previous inability to open his mouth adequately for dental care due to his work-related TMJ injury. CX 22. After discovering that the Employer would not authorize payment for the restorative procedures, Dr. Burke responded in a letter dated March 31, 2000 that he was "completely professionally amazed." CX 35. He also stated that injections of local anesthesia were necessary to prevent pain in the Claimant while he performed restorative procedures. CX 35. Dr. Burke testified at a post-hearing deposition taken on April 16, 2002. CX 49. He was board-certified as an oral and maxillofacial surgeon at the time that he previously testified in 1995 but no longer maintains this certification. *Id.* at 4. He stated that he first saw the Claimant again in September 1997 on after the TMJ replacement surgery for a dental work-up. TR 11. He removed four teeth that were non-restorable and performed restorative procedures on other teeth. *Id.* at 12-13. When asked whether the Claimant's TMJ condition contributed to his need for this restorative work, Dr. Burke stated that "the cause of the problems that the patient had at the time in '97 and '98 was directly related to the lack of anyone's ability to get in the mouth to do any restorative work-up." *Id.* at 13. Dr. Burke further stated that he used injections in the TMJ in order to make the Claimant comfortable while he was performing dental work. *Id*. at 14.

Regarding the Claimant's dental hygiene, Dr. Burke testified that the Claimant was in reasonably good dental health when he was first seen in 1988 and that his records showed that the Claimant had six metal fillings in the upper arch, two fillings in the lower arch and no evidence of gum disease in 1988. *Id*. at 28-30. Dr. Burke further testified that the Claimant would have been able to brush the fronts of his teeth between 1993 and 1996 but could attend to his back teeth only with difficulty. *Id.* at 32-33. Dr. Burke was asked whether the fact that the Claimant was limited to a liquid or soft food diet prior to his TMJ replacement had any connection to dental decay, and he replied that debris is left on the teeth after ingestion of a soft meal, where solid food

can have a cleaning effect on the teeth. *Id*. at 33. He explained that a person who eats a hard biscuit will have cleaner teeth than a person who eats an oreo cookie. *Id*. at 34.

Dr. Burke stated that it is his opinion that the Claimant currently needs complete extraction of his remaining upper teeth and replacement with a full denture. *Id*. at 35. He said that the need for this extraction is due to previous fillings being "clinically defective" and the fact that no dentistry could be done from 1988 to 1997. *Id*. at 35-36. He concluded that were it not for the Claimant's TMJ condition his teeth would be "all right" and he would not need full upper dentures. *Id*. at 42-43.

At the Employer's request, Leonard Skope, D.D.S., a board-certified oral and maxillofacial surgeon, reviewed the Claimant's medical records, including the records from Dr. Burke, and provided the following opinion on the relationship between the Claimant's restorative dental needs and his injuries at the Employer:

> As far the issue of the patient[']s general dental needs being causally related to the injuries in question, no direct relationship between the accident or treatment rendered to these needs can be demonstrated. Although there is no question that the patient's mandibular mobility has been hampered, he states that other that the period immediately following the total joint replacement surgery, he has been able to maintain good oral hygiene. There is no indication that the medications the patient takes have any direct effect on the dentition. Furthermore it is difficult to understand the need for temperomandibular [sic] joint injections prior to restorative work, particularly in the anterior region.

RX 1 at 4. Dr. Skope's deposition was taken on April 12, 2002. RX 11. He agreed with Dr. Burke that the Claimant needs extensive extraction work and dentures and that Dr. Burke's dental plan is appropriate, but he stated that he found "no causality between the [Claimant's work-related] injuries as described in the records and the extraction and fabrication of the . . . dentures at this point." *Id.* at 10, 18, 20. Dr. Skope testified that a person who is able to open his mouth to 31 millimeters would be able to care for his teeth, and he stated that the Claimant reported that he was able to maintain good oral hygiene at the time that he was examined in February 2002. *Id.* at 12-13. He explained that his review of the records indicated that the Claimant had been able to adequately care for his teeth and that there was nothing to indicate any medical or pharmacologic reason for the breakdown of the teeth, so that he "could find no direct correlation between the injury to his TMJ and his inability to maintain his dental health." *Id.* at 21. He further testified that "[t]here's nothing in the records to indicate" that the Claimant's work-related injuries contributed to or accelerated the Claimant's dental problems, and he said that he "cannot account for why [the Claimant's past dental work] failed, cannot credit the injury at Electric Boat for its failure." *Id.* at 21-22. He said that he had no opinion on the cause(s) of the Claimant's dental condition, although he did comment that the Claimant's presentation is consistent with "either dental neglect, poor oral hygiene, or poor dentistry." *Id.* at 22.

On cross-examination, Dr. Skope agreed that the Claimant would have been in considerable pain prior to the TMJ replacement surgery and that his pain could have contributed to the Claimant's reluctance to maintain good oral hygiene. *Id.* at 26. He stated that a diet limited to soft or liquid foods could contribute to tooth decay if the foods had a high sugar content, and he acknowledged that there were numerous occasions prior to the TMJ surgery where Dr. Burke's records reflected that the Claimant's maximum oral opening was substantially less than 31 millimeters. *Id.* at 27-29. He further testified that if the Claimant was unable to maintain good dental hygiene between 1993 and 1996, this inability would have contributed to the deterioration of his dental condition. *Id.* at 29. He stated that he had difficulty in connecting the Claimant's TMJ condition with his dental deterioration because the records showed that he had received significant restorative work between 1996 and 2002 and "if the care was appropriate and if the post-op oral maintenance by the patient and the oral health team, hygienist, dentist, whatever, was appropriate, those teeth should have been able to be maintained over that time frame." *Id.* at 30. He stated that the Claimant's loss of hygiene between 1992 and 1996 "may well have contributed to the fact that he needed some dental work immediately after the total joint replacements were done, but I cannot account for the continued deterioration since that work was done." *Id.* However, he conceded that he did not know what the Claimant's teeth looked like in 1996 and 1997. *Id.* at 30-31.

From the foregoing discussion of the medical opinions from Drs. Burke and Skope, it is clear that there is no dispute that the Claimant needs extraction and denture replacement work and that Dr. Burke's dental treatment plan is appropriate. On the question of causation, Dr. Burke contends that the Claimant's dental deterioration and his consequent need for extraction and dentures is related to his TMJ condition because he was unable to maintain proper oral hygiene prior to the TMJ replacement surgery and because the TMJ condition prevented him from performing dental work in the years preceding the replacement surgery. Based on Dr. Burke's opinion, I find that the Claimant has established a *prima facie* case that his dental extraction and denture work is compensable. *See Turner v. Chesapeake and Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984) (claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition).

On the other hand, Dr. Skope found no "direct" relationship between the Claimant's TMJ condition and his dental deterioration, but he did acknowledge that inadequate dental hygiene prior to the TMJ replacement surgery in 1996 would have contributed to the Claimant's dental decay, that the Claimant's TMJ-related pain could have compromised his ability to maintain proper oral hygiene. Thus, Dr. Skope concedes that while the Claimant's TMJ condition may not have directly caused his dental problems, it may have played a contributory role. This concession is critical because if medical treatment is in part necessitated by a work-related condition, the entire cost of the treatment is compensable. *Turner*, 16 BRBS at 258. Dr. Skope also intimates that the Claimant's current dental condition may be more a product of "poor dentistry" following the TMJ replacement surgery than it is attributable to decay caused by pre-surgical hygiene problems, but the Act holds an employer responsible for "for all legitimate consequences following an accident, including unskillfulness or error of judgment of the physician furnished . . .

." *Lindsay v. George Washington University*, 279 F.2d 279, 280 (D.C. Cir. 1960). As Dr. Ballon observed, this is a very difficult case. The Claimant's medical history is complex and potentially confusing. It is likely that there are multiple factors that combined to produce the unfortunate state of health in which we find him today. However, for purposes of imposing liability under the Act, it is enough that the Claimant prove that a work-related injury was one of the contributing factors. On this record, I find that the Claimant has proved that his extractions and dentures are at least in part necessitated by his work-related TMJ condition. Since there is no dispute that this dental work is necessary and reasonable, I conclude that the Employer is liable for the entire cost of such treatment.

2. TMJ Injections and Pain Medication

Dr. Burke states that he uses local anesthesia on the Claimant's TMJ to make him comfortable while he does dental restoration work. CX 49 at 13-14. He also testified that he has been prescribing the Claimant's pain medications for years pursuant to a long-standing agreement that he has with Dr. Sculco that one or the other will prescribe pain medications but not both. *Id. at* 15. Dr. Burke testified that he attends seminars and keeps up with the literature on pain management, and he stated that the dosage of pain medication is determined by a patient's weight and that he feels that the Claimant's pain medication is well-managed. *Id*. at 17-20. On cross-examination, Dr. Burke denied that the amount of prescribed pain medication is excessive, and he noted that the Claimant was responding well without signs of depression. *Id*. at 39. He stated that the pain medication is prescribed not just for the Claimant's TMJ and oral/facial pain but for cervical pain which he described as overlapping. *Id*. at 40. While he acknowledged that he did not treat the Claimant for his neck and back conditions, he added that the prescribed pain medication "should take care of any pain, whether it's toe or in the hairline." *Id*.

Citing Dr. Skope's opinions, the Employer argues that the Claimant has not established that the pain medication and local anesthesia prescribed by Dr. Burke constitute reasonable and necessary care. Employer's Post-hearing Memorandum at 8-10. In his report, Dr. Skope made the following observations regarding the Claimant's pain medications:

> At the present time, it is my opinion that the patient[']s inability to work, which he notes is dependent upon his medications and inability to walk or stand up for prolonged periods of time, is dependent upon his neck and back problems as opposed to the temporomandibular joint area. Similarly, it is impossible to determine the advisability of the patient[']s present medication regimen. The likelihood is that the majority of the needs are again from the neck and back regions. In order to better assess the regimen, the patient[']s need and responses, in as much as his problem is a multidisiplinary [sic] one being followed by multiple clinicians, a referral to a chronic pain center for medication management might be of benefit. Dr. Harris suggested such a course in l996.

RX 1 at 5. At his deposition, Dr. Skope testified that the "volume of narcotics being prescribed and, I assume, being consumed is far in excess of the recommended dosage of those forms and are well into the area of a safety concern as far as side effects and toxicity." RX 11 at 20. He did not have any opinion on whether the prescribed pain medications are appropriate for the Claimant's back and neck pain, but he held fast to his opinion that the amount of medication is excessive, and he said that it is inappropriate for Dr. Burke to be prescribing medication for the back and neck conditions. *Id.* at 31-32. He further stated that it would be appropriate to change the Claimant's pain medication regimen, and he suggested that the Claimant should be referred to a pain management center. *Id.* at 32.

Finally, Dr. Skope stated in his report that he had difficulty understanding the reasons for Dr. Burke's repeated use of local anesthesia injections; RX.1 at 4; and he testified at his deposition that he has never had to use any type of injections to examine a TMJ patient's mouth, although he does not do regular dental work on TMJ patients. RX 11 at 33.

Taking Dr. Skope's final point first, I am not persuaded that the evidence fails to establish the appropriateness of Dr. Burke's use of local anesthesia. While Dr. Skope may have had difficulty understanding the reasons for the use of local anesthesia, Dr. Burke provided a reasonable explanation – namely, to make the Claimant comfortable while he is undergoing dental work. And, the fact that Dr. Skope has never had to use injections to *examine* a TMJ patient's mouth does not seem particularly relevant because Dr. Burke uses the injections to accomplish actual dental work, something that Dr. Skope does not do with TMJ patients. Moreover, even if Dr. Skope had testified that he never had to use local anesthesia to perform dental work on a TMJ patient, it would not necessarily follow that Dr. Burke's use of local anesthesia on the patient is inappropriate or unnecessary. Once again, I note the difficult and complex nature of the Claimant's medical and dental condition, and I find it particularly appropriate under these circumstances to give some deference to Dr. Burke's judgement as the Claimant's treating dentist for many years over a physician who has only examined him on a single occasion. For these reasons then, I find that the Claimant has met his burden of establishing that Dr. Burke's use of local anesthesia injections constitutes necessary and reasonable medical care for his work-related dental condition.

The prescriptions for pain medication are a little more problematic, especially since several physicians have expressed concern over the amount of prescription narcotics used by the Claimant. After careful consideration of the various opinions, I have decided to place greatest reliance on the consultative report submitted by Edward P. Hargus, M.D. who was brought in specifically to evaluate the Claimant's narcotic use while he was hospitalized for the TMJ replacement surgery in 1996. Dr. Hargus noted that the Claimant's medications at the time consisted of two Percocets every six hours and Soma, Tylenol #3, Valium and Elavil at bedtime. CX 5 at 8. His impression was chronic pain syndrome, and he commented that the Claimant seemed to be handling the pain fairly well and that his history did not reflect narcotic abuse. *Id.* at 9. Dr. Hargus stated that the Claimant multiple pain etiologies, and he concluded, "I think we would just maintain him on the present medications." Dr. Hargus stated that he did not think that

there was much of a possibility of getting the Claimant off of his medications, and he suggested that a psychologist may be of some help. *Id*. In my view, Dr. Hargus's evaluation is the most comprehensive and reliable evaluation of the Claimant's pain management treatment, and I find on the basis of his evaluation that the Claimant's prescription pain medications constitute reasonable and necessary medical care for which the Employer is liable under section 7 of the Act.

F. Special Fund Relief

Section 8(f) of the Act provides that where an employee with an existing permanent partial disability suffers a subsequent injury resulting in a total permanent disability which is not solely attributable to the subsequent injury, an employer's liability for payment of benefits under the Act is limited to no greater than a period of 104 weeks with the remaining compensation paid by a Special Fund established pursuant to 33 U.S.C. § 944. 33 U.S.C. §908; *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail it self of relief in regard to the Claimant's permanent and total disability benefits, the Employer must meet three requirements to avail itself of section 8(f) relief: (1) the employee must have has a preexisting permanent partial disability; (2) the preexisting disability must have been manifest to the Employer; and (3) the employee's permanent total disability must not be solely due to the subsequent injury. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793 (2nd Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992).

In his 1996 decision, Judge Di Nardi did not award the Employer relief under section 8(f) because he found that the Claimant was not permanently disabled. However, he did make alternate findings under section 8(f) in the event his finding on permanency were overturned on appeal, and he concluded that the Employer satisfied the requirements for relief:

> On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked at the Employer's shipyard since March 4, 1970 (CX 1), (2) that his first back injury occurred in 1974, (3) that he sustained a severe back injury in 1975, (4) that he reinjured his back several times thereafter, (5) that his back injuries have resulted in multiple surgical procedures, (6) that Claimant's December 10, 1992 work injury resulted in TMJ dislocation, (7) that two surgical procedures have already been performed to correct the TMJ syndrome, (8) that a third surgery has been recommended and awaits approval by the Employer, (9) that Claimant's injuries had resulted in cervical and lumbar impairment as of September 18, 1988 (RX 11), (10) that the Employer nevertheless retained Claimant as a valued employee, (11) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (i.e., his cervical and lumbar spine impairment as of September 18, 1988 (RX 11)), and his November 20, 1992 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Alan H. Goodman. (RX 6, RX 7). See Atlantic & Gulf

> Stevedores v. Director, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); Dugan v. Todd Shipyards, 22 BRBS 42 (1989).
>
> Claimant's condition, prior to his final injury on November 20, 1992, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. C & P Telephone Company v. Director, OWCP, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), rev'g in part, 4 BRBS 23 (1976); Preziosi v. Controlled Industries, 22 BRBS 468 (1989); Hallford v. Ingalls Shipbuilding, 15 BRLBS 112 (1982).

Decision and Order at 23. Judge Di Nardi's findings are fully supported by uncontradicted evidence of record, and I adopt them as my findings. Accordingly, I conclude that the Employer has satisfied the requirements for Special Fund relief under section 8(f), thereby limiting its liability for the Claimant's permanent total disability compensation the statutory maximum period of 104 weeks. 33 U.S.C. § 908(f)(1). Section 8(f), however, does not relieve the Employer of its liability for the Claimant's medical care. *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978).

E. Compensation and Benefits Due and Employer Credits

1. Compensation

Pursuant to section 8 of the Act, the amount of the Claimant's disability compensation must be determined with reference to his average weekly wage. 33 U.S.C. § 908. In cases involving a traumatic injury, the average weekly wage is calculated as of the time of injury for which compensation is claimed. 33 U.S.C. § 910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Hasting v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85 (D.C. Cir.1980), *cert. denied*, 449 U.S. 905 (1980). I have adopted the parties' stipulation that the applicable average weekly wage is $578.65, and I have concluded that the Claimant has been under a permanent total disability since July 24, 1997. Consequently, I find that the Claimant is entitled under section 8(a) of the Act to permanent total disability compensation from July 24, 1997 to the present, and continuing, based on the average weekly wage of $578.65 which produces a two-thirds weekly compensation rate of $385.77. The Employer's liability for such compensation is limited by section 8(f) to a period of 104 weeks running from July 24, 1997, and the Special Fund assumes responsibility for payment of the Claimant's compensation upon expiration of the 104 week period.

2. Interest

Although the record shows that the Claimant has received temporary total disability compensation since July 24, 1997, his permanent total disability payments would have been greater by virtue of section 10(f) of the Act which provides for annual increases to permanent total disability compensation and death benefits on October 1st of each year. Since there has been an underpayment of the Claimant's compensation since October 1, 1997, I will order that interest be added to all unpaid amounts. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. § 1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. Medical Bills

The record shows that because of the Employer's refusal to pay for the Claimant's restorative dental work and pain medications, the Claimant had accumulated expenses by the time of the hearing in the amount of $1,820.00 for dental work performed by Dr. Burke and $11,091.64 for prescription pain medication. CX 41, 46. In view of my finding that the dental work and pain medications constitute reasonable and necessary medical care for the Claimant's work-related injuries, I will order the Employer to reimburse the Claimant for these expenses with interest. *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 76, 79-80 (1997).

4. Credits

Based on the parties' stipulation that the Employer has voluntarily paid temporary total disability compensation since February 11, 1993, I find that the Employer is entitled to a credit in the amount of its prior voluntary compensation payments pursuant to section 14(j) of the Act. *Balzer v. General Dynamics Corp*., 22 BRBS 447, 451 (1989), *aff'd on recon.*, 23 BRBS 241 (1990). Indeed, since the Employer has been paying temporary total disability compensation since July 24, 1997 when the Claimant's disability became permanent, the amount of the credit will undoubtedly exceed the amount of the Employer's limited liability for permanent total disability compensation. Therefore, I find that the Employer is also entitled to interest from the Special Fund on the amount of its overpaid compensation. *Campbell v. Lykes Bros. Stemship Co.*, 15 BRBS 380, 383 (1983).

F. Attorney's Fees

Having successfully established his right to compensation and medical care, the Claimant is entitled to an award of attorneys' fees under section 28 of the Act. *American Stevedores v.*

Salzano, 538 F.2d 933, 937 (2nd Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

III. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, General Dynamics Corporation/Electric Boat Division, shall pay to the Claimant, Brian M. Rezendes, Sr., permanent total disability compensation pursuant to 33 U.S.C. § 908(a), plus annual adjustments pursuant to 33 U.S.C. § 910(f),[5] at the rate of $385.77 per week from July 24, 1997 and continuing thereafter for 104 weeks;

2. The Employer is entitled to a credit pursuant to 33 U.S.C. § 914(j) in the amount of all temporary total disability compensation paid to the Claimant since July 24, 1997 and interest from the Special Fund on any overpaid compensation amounts paid in excess of its limited liability pursuant to 33 U.S.C. § 908(f);

3. After the cessation of payments by the Employer, continuing permanent total disability compensation benefits shall be paid, pursuant to 33 U.S.C. § 908(f), from the Special Fund established at 33 U.S.C. § 944 until further order;

4. The Special Fund shall pay the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid;

5. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related mental condition may require pursuant to 33 U.S.C. § 907, including all dental extraction and restoration work provided by Dr. Casper H. Burke and pain medication prescribed by Dr. Burke;

6. The Employer shall reimburse the Claimant in the amount of his out-of-pocket expenses for dental extraction and restoration work provided by Dr. Casper H. Burke and pain medication prescribed by Dr. Burke, and it shall pay interest on any such expenses at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until reimbursement is made;

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[5] Annual adjustments pursuant to section 10(f) of the Act are payable on October 1st of each year once a claimant acquires status of permanent total disability. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990). The Claimant acquired permanent total disability status on July 24, 1997.

6. Counsel to the Claimant shall file within 30 days of the service of this Decision and Order an application for attorney's fees which complies with the requirements set forth at 20 C.F.R. § 702.132, and the Employer shall be allowed 15 days after service of the fee application to file any objection thereto; and

7. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd